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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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# No. 443

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HARRY O. PAULY,

*Petitioner,*

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

*Respondents.*

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## BRIEF OF RESPONDENTS

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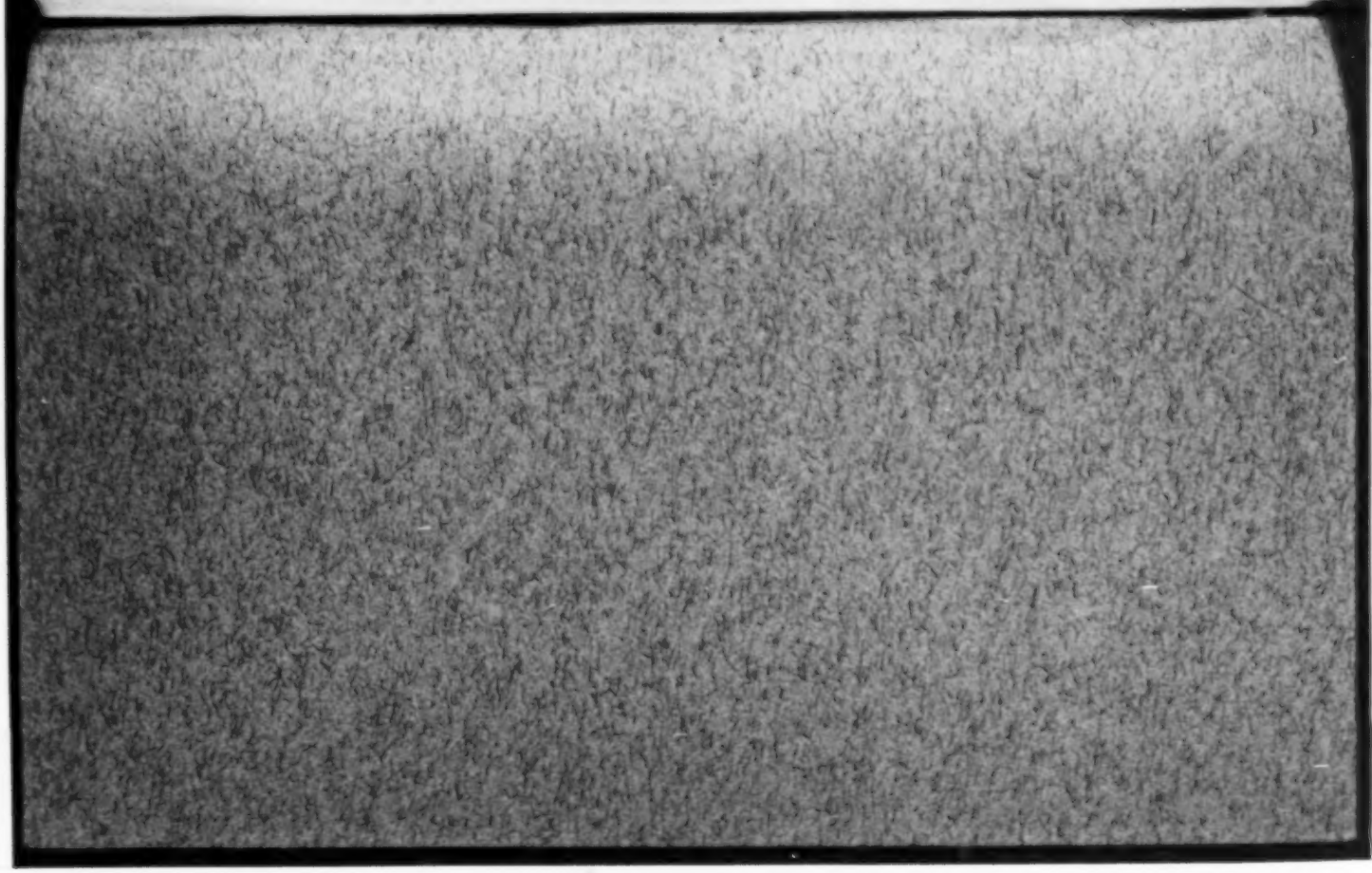

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## BRIEF OF RESPONDENTS

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### PRELIMINARY NOTES AND REMARKS

A lantern such as Pauly carried at the time of the accident, Exhibit 3, was admitted in evidence and is with the record (R. 202). A ten minute yellow fusee, such as Pauly carried, was admitted in evidence and will be delivered to the Clerk by stipulation (R. 202, 203).

All italics are added.

**The Supreme Court of Utah has manifested a sincere, conscientious and intelligent disposition to apply the Federal**

**Employers' Liability Act strictly in accordance with the applicable decisions of the Supreme Court of the United States.**

Petitioner throughout his brief is abusive to the Supreme Court of Utah and makes the wholly unwarranted charges that it follows a policy of frustrating the operation of a Federal statute and ignoring and refusing to follow the decisions of the United States Supreme Court. The actions of counsel for the petitioner belie this charge, else why do they select Utah as the forum in which they institute F. E. L. A. cases arising in States other than Utah in favor of citizens of States other than Utah?

See:

*Ehalt* v. *McCarthy*, 104 Utah 110, 138 P. (2d) 639. Ehalt was a resident of Denver and was injured while working in Denver.

*Bruner* v. *McCarthy*, 105 Utah 399, 142 P. (2d) 649. Bruner was a resident of Grand Junction, Colorado, and was injured while working in Colorado.

*Allison* v. *McCarthy*, 106 Utah 278, 147 P. (2d) 870. Allison was a resident of Colorado and was injured while working near the Royal Gorge in Colorado.

*Pauly* v. *McCarthy*, 166 P. (2d) 501 (not yet reported in Utah Reports). Pauly was a resident of Grand Junction, Colorado, and was injured while on duty near Glenwood Springs, Colorado.

*Ayers* v. *Union Pacific Railroad Co.*, decided Dec. 1946, not yet reported. Ayers was a resident of Wyoming and was injured at Cheyenne, Wyoming.

In three out of five of these cases decided since the Tiller case, the Utah Supreme Court held that directed verdicts for defendants were improper.

The foregoing are only a few of the many cases that counsel for this Petitioner have filed and are filing in the Utah courts under the Federal Employers' Liability Act against the various railroads, involving accidents to residents of foreign States, occurring in foreign States.

A reading of the five cases above cited will demonstrate a disposition on the part of the Supreme Court of Utah conscientiously to apply the Federal Employers' Liability Act according to the applicable decisions of the United States Supreme Court, having full regard to the broadening of the Act which has followed the decisions commencing with *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 86 L. Ed. 446, 63 S. Ct. 444.

Petitioner contends that the Supreme Court of Utah is "not in accord with the holding of this Court in the *Tiller* case—" in regard to assumption of risk. It is submitted that the Utah court in the *Pauly* case manifested complete sympathy with the decision in the *Tiller* case regarding assumption of risk and that its decision is in no way based upon assumption of risk. The court referred to assumption of risk as "a cruel doctrine" and stated that it was fortunate that it had been "forever abolished in the railroad industry" (R. 185).

Petitioner asserts that the labored reasoning of the majority opinion demonstrates that it was laboring to defeat plaintiff's action. On the contrary, it is submitted that the writer was trying to find some judgelike and lawyerlike way to support the verdict and had been unable to do so.

**The Supreme Court has shown a most tolerant and forbearing attitude toward petitioner in view of his flagrant misconduct in attempting to "reconstruct" his evidence to his own advantage.**

As will be shown in the statement of the case, Section (6), the record establishes as matter of law that there was no passing train on the passing track when Pauly dismounted from the caboose. Such was his evidence both on deposition and on cross examination at the trial. Nevertheless at the trial petitioner's counsel, by shockingly leading and suggestive questions, brought out that Pauly had "reconstructed" his evidence on this subject. At R. 138 the following transpired:

> Q. By the way, these depositions that Mr. Van Cott has called to your attention here, those depositions was taken some six months after you were injured, was it not?
>
> A. Yes, sir.

Q. You may state whether or not since that time you have made any effort to reconstruct in your own mind the events and particulars of the occasion when you got injured?

A. Yes, sir, I have.

Q. Has your thought on that matter refreshed your recollection?

A. It has, very much.

Q. Will you tell the jury now under your oath whether or not you were on the east end of the caboose or the west end of the caboose when you checked Train No. 20?

A. I was on the west end of the caboose.

Q. And so when you stated in your depositions that you were on the east end of the caboose, you were in error?

Mr. Van Cott: Just a moment, I object to counsel leading his witness on this vital point.

The Court: Objection sustained.

Q. Were you in error when you stated on August 2nd of this year that you were on the east end of the caboose when you checked this Train No. 20?

Mr. Van Cott: That is the same question, if the Court please, leading.

The Court: He may answer.

A. That is an error.

It will be observed that the fact of "reconstruction" and the substance of the "reconstruction" of evidence were both placed in the mouth of Pauly by shockingly leading and suggestive questions.

The Supreme Court of Utah might well have applied a much harsher expression than "reconstruction" to this effort by Pauly (under questions from his counsel) to depart from the truth and change his evidence. That the court did not take a more drastic view, with appropriate action, manifests a tolerance and forbearance to Pauly's case which entirely refute the vituperative remarks in Pauly's brief.

## STATEMENT OF THE CASE

Respondents are constrained to make a statement of the case, because Petitioner misstates and omits important evidence and facts.

Pauly, an experienced railroad conductor, was injured when he stepped off and dropped from a standing caboose (R. 92) in the night time without looking for safe footing (R. 133-135), in violation of Safety Rule No. 3 of the Company reading:

> "Before getting on or off equipment, employees must look out for safe footing—." (R. 7, 130, admitted in evidence R. 131.)

Pauly knew this rule and knew it was necessary to look for safe footing before stepping down. (R. 132.) There was no footing whatever where he stepped off, because the south step of the caboose was almost flush with the south ends of the ties of the bridge. (R. 30.) He dropped off into space and fell 17 feet to the bottom of the creek. (R. 92.)

Pauly, if he had looked, could have seen that there was no footing and that he would drop into the creek bed. (R. 52, 53, 55, 74, 76, 88, 101, 102, 114.) He had in his hands when he stepped off, a lighted electric hand lantern (R. 91) and a lighted yellow fusee (R. 91), either of which, if he had looked, would have disclosed the situation and danger. (R. 52, 62, 157.)

Pauly was thoroughly familiar with the bridge, the platform on the north side and the absence of a bridge on the south side (R. 106, 107). Pauly thought about the danger of the bridge only a few seconds before he dropped off (R. 108) and realized he was near it, but guessed that he was past the bridge by three or four car lengths, (R. 109) (150 to 200 feet) (R. 38), and acting upon that guess dropped off without looking.

Pauly had no work to do on or near the bridge itself. (R. 88.) The west bound train had been brought to a stop at Chacra because shortly before reaching there Pauly, his rear flagman Ventura, the Engineer Linkins and the head brakeman all

knew that brakes were sticking, causing fire, on a truck of a car in the train. (R. 36, 69, 86.) Pauly thought that the car in question was ten to fifteen car lengths (500-750 feet) ahead of the caboose. (R. 88.) It was Pauly's duty as soon as the train was stopped to dismount from the caboose and walk from 500 to 750 feet westerly to the car that was in trouble and eliminate the sticking brakes. (R. 88.) Pauly had no work to do at the bridge. On the contrary it was his duty, as he himself testified, to proceed forthwith to the car that was in trouble to fix it. (R. 88.)

When the engineer first became aware of the sticking brakes and the necessity of stopping, the engine was "just about at the east switch at Chacra." (R. 76.) He merely proceeded easterly a little more than the length of the train before stopping.

The train stopped on the main line which was the southerly of the two tracks. North of it was the passing track. The space between the two tracks was completely covered by a plank footwalk, 12 feet wide with 7 to 8 feet clearance if trains occupied both tracks. (R. 50.) Pauly could have dismounted on it and crossed over the bridge on it on his way to the car with the sticking brakes. Exhibit E (R. 207, admitted in evidence R. 28), Exhibit M (R. 217, admitted in evidence R. 29), Exhibit I (R. 223, admitted in evidence R. 28). Pauly, stepped off on the other side, the south side where there was no footwalk. (R. 92.)

Pauly's train was stopped and there was no train on the passing track when Pauly stepped down. Nor was there any train on the passing track while Ventura, after the accident, walked forward twenty to twenty-five carlengths, 1000 to 1250 feet, and then returned to the caboose. (R. 41, 46.)

Pauly could have proceeded safely along the north side (i. e. the side on which there was a bridge) of the train to fix the sticking brakes, as indeed Ventura actually did immediately after the accident. (R. 41, 46.)

Pauly could have discovered and fixed the sticking brakes from the north side (i. e. the side on which there was a bridge) as indeed Ventura actually did after the accident. (R. 46, 60.)

Chacra, where the accident happened, is merely a railroad siding. (R. 43, 44, 68, 69, 83, 84.)

**Omissions and Misstatements of Facts in Petitioner's Statements of Facts**

(1) *Petitioner stepped off the caboose without looking to see whether he had safe footing.*

Petitioner's brief attempts throughout to give the impression that the petitioner looked effectively before dismounting from the caboose.

Pauly testified both in his deposition and on cross examination at the trial that he stepped off the caboose without looking. His deposition was taken on August 1, 1944, six months after the accident and less than two months before the trial. In it he testified over and over again that he did not look before he stepped down. The following answers from Pauly's deposition were admitted by him on cross examination at the trial to be true:

> Q. Did you look down there before you stepped?
>
> A. No, it was all black to me as if I was on the main line is all, on the side of the track. (R. 167.)

Pauly admitted this answer was true at R. 133, 134.

> Q. You didn't look before you stepped then?
>
> A. No, my idea was I was going to go down to the car and look at it as fast as I could while we were still stopped; I picked up the fusee, took my lantern, cracked the fusee and stepped right off. (R. 167.)

Pauly admitted this answer was true at R. 134.

> Q. Did you turn your lantern, the light of it, down below where you were going to step, before you stepped down?
>
> A. I had it lit; I didn't turn it downwardly; I would have the light in my hand; as I cracked the

fusee I had it in my hand; I had this hand (indicating) on the hand rail of the caboose on this side; as I stepped down this hand would be here (indicating), the light would be here (indicating); as I stepped down you would figure you was on the ground ready to move. (R. 167.)

Pauly admitted this answer was true at R. 134.

Q. You didn't look down?

A. No; you are standing on the end of the caboose like this (indicating), you crack the fusee, the lantern in your hand. (R. 167.)

Pauly admitted this answer was true at R. 134.

Q. You just stepped down?

A. I just stepped down. (R. 168.)

Pauly admitted this answer was true at R. 135.

Q. Without looking?

A. Yes, figuring that was the ground. (R. 168.)

Pauly admitted this answer was true at R. 135.

Pauly's admissions on cross-examination were subsequent to his evidence referred to on page 6 of his brief. No attempt was made to rehabilitate Pauly after cross examination on this point.

The evidence relied on by plaintiff on page 6 is at best extraordinarily weak because it does not justify any inference of *looking effectively* or even *attempting to look effectively.* It is merely that he "glanced down." At most it would be a mere scintilla of evidence. Under the F. E. L. A. there must be more than a scintilla of evidence.

*Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232. Dec. 20, 1943. On page 479 the court said:

> • • • *The weight of the evidence under the Employers' Liability Act must be more than a scintilla*

*before the case may be properly left to the discretion of the trier of fact—in this case the jury.*

But, assuming that such weak evidence is entitled to any weight or to be regarded as more than a scintilla if standing alone, its effect was entirely destroyed by the above described cross examination. Contrary to plaintiff's vehement contentions, it is not the law that he can create questions for the jury by his own self contradictions.

*UNDER THE LAW THE COURT SHOULD CONSIDER THAT PORTION OF A PARTY'S TESTIMONY TRUE AS BEARS MOST STRONGLY AGAINST THE PARTY'S INEREST.*

*Fowler* v. *Pleasant Valley Coal Co.*, 16 Utah 348, 52 Pac. 594. Plaintiff was injured by coal falling from the roof of defendant's mine. At one place he testified that his foreman assured him that the ceiling was safe and that he relied upon that assurance and believed it. In another place he testified that he considered the place dangerous and so thought immediately before the happening of the accident. The court held that there was no question for the jury. On page 596 it said:

> * * * *If there be a contradiction, it arises from the plaintiff's own testimony. In such a case, where a nonsuit is asked, the trial court may consider such testimony true as bears the most strongly against the interest of the plaintiff.*

*Casey* v. *Northern Pac. Ry. Co.*, 60 Mont. 56, 198 Pac. 141. In this case plaintiff contradicted himself at the trial, contradicted the allegations of his verified complaint and was contradicted by his previous statements. On page 145 the court said:

> It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements. A party testifying in his own behalf has no right to be deliberately self-contradictory, and whenever he is so the courts are justified in judging his case from that version of his testimony which is least favorable to

him. Atlanta R. etc., Co. v. Owens, 119 Ga. 833, 47 S. E. 213.

The principle of the *Fowler* case is well-settled law and further citations will not be added.

***IT IS ALSO WELL-SETTLED LAW THAT WHERE A PARTY TO AN ACTION TESTIFIES TO SOMETHING THAT PREJUDICES HIS CASE OR PUTS HIM OUT OF COURT, HE IS NOT PERMITTED THEREAFTER TO TESTIFY TO THE CONTRARY.***

*Smith* v. *Boston Elevated Ry. Co.*, 184 Fed. 387, (1st C. C. A.). Plaintiff sued defendant for personal injury sustained while a passenger and at the first trial testified that at the time the train started she was in a position of unstable equilibrium. On the first appeal the First Circuit Court of Appeals held that under such circumstances she could not recover and reversed. At the second trial she testified that she was braced against the starting of the train. The court held that she would not be permitted to change her testimony. On page 389 the court said:

> As the inconsistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. Previous inconsistent statements of a witness other than a party ordinarily go merely to the credit of the witness, and upon a second trial it may be left to a jury to decide which of the inconsistent statements is to be credited. *The sworn testimony of a party, who has control of his case, with power to bind himself conclusively by pleadings, stipulations or admissions, as to facts resting upon his own knowledge, is of such solemn character that in the absence of a clear showing of mistake inadvertency, or oversight, it should ordinarily be regarded as precluding him from seeking to establish before another jury an inconsistent state of facts.*

Pauly's evidence that he glanced down is wholly uncorroborated.

*Davis* v. *Woolworth Co.*, 60 Fed. (2d) 344 (10th C. C. A.). Davis sued for injuries resulting from a fall down an elevator shaft. He was working for the defendant. At the first trial he testified that he stepped into the shaft without looking to see whether the elevator was on that floor. The first trial was decided against him. At the second trial he testified that he did look to see whether the elevator was on the floor and was unable to see. In regard to this the court on page 346 said:

> In view of the many decisions on this subject, we are constrained to hold that the right of the plaintiff below to go to the jury on his diametrically opposed evidence on the vital question in this case, uncorroborated, leaves no room for doubt that the action of the trial court in directing a verdict was right and must be affirmed.

It is submitted that the Supreme Court of Utah correctly decided that Pauly did not give any substantial explanation of his change of testimony. (R. 184.)

(2) *The record conclusively shows that petitioner would have seen the danger if he had looked effectively.*

Pauly in his brief claims it was so dark that he couldn't see where he was stepping and attempted to justify his failure to see that he was stepping off into space by alleging in paragraph 6 of his complaint, "that owing to the weather conditions and the darkness of the night as aforesaid, it was impossible for plaintiff to discover or ascertain the facts with regard to the place where said caboose had been brought to a stop and plaintiff had no knowledge and did not know that the said caboose had been and was stopped upon said bridge." (R. 3.) There was no evidence to support this allegation. On the contrary the evidence affirmatively and without contradiction shows that Pauly could have seen if he had used his lantern or fusee and his eyesight, which was good. (R. 101.) He testified that it was just commencing to snow and that it was not snowing enough to interfere with his vision. (R. 102.) He saw the fire flying from the sticking brake ten to fifteen cars (500-750 feet) ahead of the caboose. (R. 88.)

He was able to check the engine number on Train No. 20 as it passed him. (R. 117.) He was able to see the mountains as he came down the track from Funston to Chacra. (R. 114.) Ventura, who dismounted only a few seconds before Pauly, was able to see where he was stepping and that it was safe. (R. 52.) The roadbed was slag but he was able to see it. (R. 52.) Ventura was using his lantern to illuminate his way as he walked back from the caboose to flag and was able to see his way all along there. (R. 53.) After the accident, when Ventura was in the creek bed some eighteen feet below the track, he was able to see the steps of the caboose. (R. 55.) Linkins also was able to see the position of the caboose from the creek bed. (R. 74.) The head brakeman was able to see Pauly's red fusee a distance of eighty-six cars or substantially four thousand feet. (R. 76.) Moreover, Ventura was able to see the signal given by the head brakeman in response to the red fusee the same distance. (R. 55.) Petitioner so states on page 4 of his brief.

Pauly, evidently conscious of the weakness of the contention that he couldn't see, attempted to take the position that he didn't use the light because it was not designed to see with but only for the purpose of making signals. (R. 139, 140.) This statement seems so ridiculous that it needs no refutation. However, it is noteworthy that Ventura used his lantern when he dismounted, saw the ground with it, found safe footing and made a safe landing. (R. 53.)

Moreover, Pauly testified that it was necessary under the rule and for his own safety to look down and that it has been his practice all through his railroad experience to look before he stepped down from equipment. (R. 133.)

The record demonstrates that Pauly's excuse of darkness for his failure to observe is without substance. The fact is that he didn't see because he didn't look.

A lantern just like Pauly's (R. 96) is in evidence as Exhibit 3 (admitted in evidence at R. 154) and a standard yellow fusee was admitted in evidence at R. 158 to show the degree of light available to Pauly and will be made available by stipulation.

(3) *Petitioner was thoroughly familiar with the existence of the bridge between the tracks and thought about the danger of the south side of the bridge a very short time before dismounting.*

Petitioner's statement of the case would give the impression that at the time he dismounted he was oblivious of the fact that there was a bridge in his immediate vicinity.

Pauly, immediately before the accident, knew that he was in the close vicinity of this bridge but thought he had passed it by about three or four car lengths. (R. 108, 109). Immediately after the accident he said, "I thought I was past the darned bridge." (R. 51.) He thought about the bridge when he was in the caboose a very short time before going to the front end and dismounting. (R. 112.)

Pauly had been crossing over this bridge for seven years, during which time he estimated: he had crossed the bridge 1000 times (R. 105); as many times in daylight as darkness (R. 106); had walked over the bridge between the tracks fifty times (R. 107); and in darkness had walked over the bridge between the tracks 10 times. (R. 108.) He had observed and knew that there was a foot walk between the tracks and that there was no foot walk or rails on the south side of the tracks. (R. 107.)

(4) *There was a wooden platform to the north of the main line track, on which petitioner's caboose stood, on which petitioner could have safely dismounted and crossed the creek.*

Petitioner's statement of the case does not disclose this important fact. On page 4 he states that there was no footwalk, platform or guard rail on "the south side of the bridge," without mentioning that there was a platform on the north side. Petitioner persisted in this omission in spite of having his attention called to it in Respondent's Brief Opposing Petition for Certiorari, pages 8 and 9. The fact is demonstrated in Exhibit E (R. 207, admitted in evidence R. 28), Exhibit M (R. 217 admitted in evidence R. 29) and in picture No. 10 of Exhibit I (R. 223, admitted in evidence R. 28.) The bridge is 11 feet 4 inches wide (R. 25) and is 92 feet 6 inches in

length. (R. 25.) There is seven or eight feet clearance when both tracks are occupied by trains. (R. 50.) If petitioner had dismounted on this bridge by getting off on the north side of the caboose he would have been entirely safe and could have crossed the bridge on the way to the place where he would make the emergency adjustment.

(5) *The evidence without contradiction negatives Pauly's contention that he had to dismount on the south side because he saw fire from the south side; demonstrates that he could have made his examination for the sticking brake from the north side of the train; and establishes that he should have used the bridge on the north side of his caboose to dismount and cross the creek.*

Petitioner on page 6 states that the fire caused by the sticking brake was seen on the south side, and for that reason he alighted from that side to fulfill his duty of inspecting and repairing the brake. This is not true. But the only reason the fire was seen from the south side is because the train was on a curve to the left which made the south side visible and the north side invisible (R. 85-87). It is uncontradicted that when one brake on a truck sticks and causes fire, all of them do and that the fire is thrown on both sides of the car. (R. 49.) The evidence shows without conflict that the identity of the sticking brake could be and actually was discovered and the brake fixed from the north side of the train after it stopped.

Ventura, testified that after the train stopped he actually found the sticking brake by looking for it on the north side of the train in spite of the fact that the fire had been seen flying from the south side (R. 46, 58, 59, 60); that they could tell from what they saw in the caboose that the fire was from a sticking brake (R. 47); that the fire was as bright as a yellow fusee (R. 48) and that it could be seen fifty cars away (R. 48); that when one brake sticks, all of them do (R. 49); that when the train is stopped the truck on which there is a sticking brake can be detected from either side of the car (R. 49). On redirect examination counsel for plaintiff attempted to put words into the mouth of Ventura, his own witness, that there would be no smoke coming from the north side wheels.

Ventura, however, testified positively that he discovered the sticking brakes from smoke coming from wheels on the north side (the platform side) of the train. (R. 60.) At R. 60 he testified:

> Q. The observation you made was with reference to smoke and odor, and that is all?
>
> A. Yes sir.
>
> Q. You don't know where it came from, do you?
>
> A. I know where the smoke come from, it was coming from the north side wheels.
>
> Q. How do you know?
>
> A. I seen them.

Ventura also testified without contradiction that no danger would be encountered in walking between the tracks to look for the sticking brake. (R. 50.) Pauly was the only other witness who testified on the subject and he also stated that when one brake is sticking all four are sticking because they are all controlled by the same brake cylinder, and that when one brake and wheel are hot and smoking, the others are also. (R. 148-150.)

(6) *The record establishes as matter of law that there was no passing train on the passing track when Pauly dismounted from the caboose.*

On pages 5, 6 and 44 and throughout the brief petitioner contends that one of the reasons he descended from the south side was because passenger train No. 20 was then passing on the north side. He pleaded it as his *only* excuse for getting off on the south side. (R. 3.)

This contention was completely rejected by the Supreme Court of Utah in the last paragraph commencing on R. 183 and ending on R. 184. It concluded that even giving Pauly the benefit of his "reconstructed testimony" Train No. 20 would have passed before Pauly stepped down. This is unquestionably true. Train No. 20 consisted only of an engine, baggage car, mail car, coach and sleeper—an engine and four cars. (R. 54.) It was going east and passed Ventura when

he was walking back to flag. (R. 38.) Even if Pauly checked only the engine of No. 20 on the west end of the caboose, that short train would have passed him before he could light his fusee and dismount. But Pauly testified that he performed his duty of checking all the equipment in Train No. 20, as required by Rule 810. (R. 116, 117.) All of Train No. 20 would therefore necessarily have passed him before he even commenced to dismount. After that train passed no other train passed during the 40 to 45 minutes until the ambulance came for Pauly. (R. 41.)

But Pauly definitely and positively testified that he was on the back platform of his caboose as Train No. 20 passed him; that while on the back platform he observed and checked the equipment in Train No. 20; and that after Train No. 20 had pased him and he had checked the equipment he went back into the caboose, put on his overcoat, went to the front platform with his lantern lighted, lighted the fusee and then stepped off the south side of the caboose step. His testimony is as follows:

> Q. At that time you were on the head end of the caboose, is that right?
>
> A. *When I checked the train I was on the rear end.*
>
> Q. When you checked the train you were on the rear end?
>
> A. That's right. When I said to the brakeman "I will go over and check that car while we are meeting another train." Evidently I knew they had our signal they were going to stop there.
>
> Q. You were on the rear platform?
>
> A. Yes; I told him to take care of the hind end; I went inside and put on my overcoat.
>
> Q. That all happened after you checked the train?
>
> A. That is, my going through the caboose to get my coat, yes.
>
> Q. Putting on your overcoat?
>
> A. Yes, I had no reason to have it on—still in the cupola; as I started to get down with it this train came

through the passing track, so I stepped to the rear platform to check it and told my rear brakeman to take care of the hind end, "I will check this car now."

Q. When you say it was engine 802 did you then know it was train No. 20?

A. Yes.

Q. Why?

A. *I checked the passenger equipment too; that is the usual passenger engine.*

Q. *Did you check the passenger equipment?*

A. *That's right.*

Q. *As it went by you?*

A. *Yes, that's right.*

Q. *When you were on the back platform?*

A. *Yes.*

Q. *What did the equipment consist of?*

A. *Baggage car, mail car, day coach and sleeper; four cars.*

Q. *Then after the train passed you going east you went back in the caboose and put on your overcoat and then went to the head end of the caboose, is that correct?*

A. *That is correct.*

Q. Was there any other equipment in the passing track after train 20 passed you?

A. No, not right exactly then, no.

Q. Was there at any time that you saw?

A. No. (R. 163-164.)

At the trial petitioner's counsel, by shockingly suggestive questions, brought out that Pauly had "reconstructed" his evidence on this subject. (R. 138.)

However, Pauly on cross examination affirmed the truth of the evidence given on his deposition: that he checked east bound

train No. 20 from the rear end of the caboose (R. 123); that he checked the equipment of train No. 20 as it went by him (R. 126); that train No. 20 was checked by him to consist of four cars, baggage, mail, day coach and sleeper (R. 127); that after he checked train No. 20 from the back platform he went into the caboose and got his coat (R. 126); and that he saw no other equipment on the passing track at that time. (R. 128.)

Here again, respondents invoke the principles of law demonstrated *supra* in Section (1) that a party cannot create questions of fact for the jury by testifying both ways; that a court regards as true that portion of a *party's* evidence which bears most strongly against such party; and that a party is not permitted to testify both ways.

(7) *There is no evidence that any Safety Rule or custom required petitioner to dismount from the south side of the caboose.*

On pages 6, 37 and 44 and throughout his brief petitioner asserts that Ventura and Pauly dismounted on the south side "in compliance with the Railroad safety rules," reference being made to R. 38, 39, 90. Venture merely testified as follows:

> Q. The south side. Have you had, as brakeman, any instructions with reference to the side from which to dismount?
>
> A. Yes sir, its the best to mount on which side is the safest.
>
> Q. Which would be the safest side?
>
> A. The left side.
>
> Q. Why?
>
> A. Because there was a train coming down the pass, might fall, and fall right into the wheels of the train.
>
> Q. And so you dismounted, as you say, from the left side?
>
> A. Yes sir.

Ventura made no mention of any Safety Rule which required him to dismount from the South side.

On page 44 also it is stated that the petitioner prepared to alight from the train on the south side because the Safety Rules required it and reference is made to page 90 of the record. The only evidence by the petitioner on the subject of rules is as follows:

> Q. During the years that you have worked for the defendant here as brakeman and as conductor, have you ever had, or received any instructions with reference to the proper side of the train from which to alight under different circumstances?
>
> A. Well, safe course is the course to pursue; one of the rules of the company, always pursue the safe course.
>
> Q. Under that rule which would be the safe side to alight from, if the train were stopped on the main line track at Chacra?
>
> Q. At night.
>
> A. Left side of the train.

Thus Pauly himself negatived the existence of any Safety Rule specifically providing that trainmen must dismount on the side away from a passing track and relied solely on the general rule to always "pursue the safe course." Pauly's conception of "the safe course" in the case at bar was to step off without looking at a place where he knew there was no platform, although he knew that on the other side of the train there was a platform.

There is no other evidence on the subject.

Merely because Ventura dismounted from the south side in no way justifies petitioner's argument that Pauly was justified in doing so. When Ventura stepped down the train was still moving and he had not reached the bridge (R. 38). When Ventura stepped down, a train was passing on the passing track (R. 38). When Pauly stepped down there was no train on the passing track (supra Section (6)). But, above all,

Ventura used his lantern to observe whether there was a safe footing and determined that he was stepping on to solid ground before he stepped down (R. 52).

(8) *There is no evidence that trains customarily stopped or were inspected or repaired at Chacra. The only evidence is that Chacra was a passing track where trains pass and where emergency work might be done.*

Plaintiff alleged that freight trains "were customarily and ordinarily stopped upon defendants' main line and passing tracks" and that it was "usual, customary and necessary for members of various train crews to pass along said trains" for the purpose of examining trains. (R. 4.)

Petitioner on pages 4, 5, 9, 10, 18, 19, 20, 23 assumes that these allegations were proved and makes the most exaggerated statements such as that the Chacra siding, including the south side of the bridge, is "continually and customarily used by defendants' employees" (page 19) and that petitioner worked on the south side of the bridge "when he was injured in the *usual* course of his employment." On page 18 of his brief he says:

> In the usual course of his employment it was necessary for petitioner to work at the time and place where he was injured. The place was within and a part of an area where the work of dismounting from trains, train inspection and repair was customarily performed.

And on page 9 of his brief petitioner says:

> The bridge at Chacra was located within the switch limits of a passing track used by respondents *at all hours of the day and night and in all kinds of weather for the purpose of stopping, inspecting and repairing trains as well as for the purpose of permitting trains to pass.*

These same ridiculously exaggerated contentions were made before the court below. The Supreme Court of Utah carefully scrutinized the record, was unable to find any such evidence and so declared. (R. 173-175, 178). It summed up the evi-

dence and record as demonstrating, without conflict, that Chacra was nothing but a passing track. At R. 178 the court said:

> * * * The only justifiable inference from all the testimony is that where there is trouble which materially interferes with movement, the train must stop and adjustments or repairs be then made unless the train can make it to an available and adequate passing track which in this particular case happened to be Chacra.

There is no evidence whatever in the record that petitioner, or any other railroad employee, has ever had any work to do on the south side of the bridge or any occasion to try to walk along it. In fact, it is impossible to walk along it when it is occupied by a train (R. 28, 30, 206).

The entire evidence on the subject of the use of the passing track at Chacra is as follows:

*Pauly* at R. 88, 89 testified as follows:

> Q. When a train is stopped on such a signal as was exhibited under your direction from the cupola of your caboose because of a sticking brake, what are the duties of the conductor, and what are the duties of the rear-end brakeman, and what are the duties of the head-end brakeman?
>
> A. Well, start from the head-end, the head-end brakeman should be looking back for—
>
> Q. I mean after the train stops, Mr. Pauly, the train has been stopped, now, in response to the signal?
>
> A. I see.
>
> Q. When it is stopped, what are the duties of the head and rear brakemen, the rear—
>
> A. After the train is stopped, the head-end brakeman will start from head-end toward the rear end; in that instance, the rear brakeman or flagman, shall pick up a particular signal, whether daylight signals,—take daylight signals—if night signals, go back immediately

to protect the rear of the train, and the conductor will go over the train to meet head-end brakeman, or, if he gets to the trouble first, then rectify it, then give a signal to head-end he has fixed it, then proceed.

Q. In other words, the conductor starts toward the scene of the trouble one way, and the head-end brakeman the other?

A. Yes, sir.

Q. Now, as I understand it, when this train finally —when the rear end of this train finally cleared the east switch point at Chacra, the train began to stop?

A. Yes, sir.

Q. And what, under those circumstances what did your duties require you to do?

A. Immediately go over and ascertain the cause of trouble on my train.

Q. And where did you have in mind that this trouble was?

A. On the left-hand side of the train where I saw the fire.

Q. Ten or fifteen car lengths?

A. Yes, sir.

Q. Before the train came to a stop you may tell the jury what you did before it came to a stop; well, as the train was coming to a stop, Mr. Pauly, was slowing down and coming to a stop, what did you do?

A. Well, as near as I remember, I picked up my light, yellow fusee, and my coat, put them on, and told my rear-end brakeman to go back and protect the rear end of the train, and I would go over and check that car.

Ventura testified at R. 43, 44 as follows:

Q. To the east and the west. Mr. Ventura, during the time you have worked for the Rio Grande, you may

state whether or not it's common practice for trains to stop and trains to pass one another at Chacra?

A. Yes, sir.

Q. And has that passing track been in constant use for that purpose during all the time you have worked there?

A. Yes, sir.

Q. Mr. Ventura, under what circumstances are trains stopped at Chacra?

A. What are they stopped for?

Q. Yes.

A. Well, if another train was coming to the passing track, they will make you wait there until he gets in the clear, then let you go; if there is trouble with the train there, they see a red fusee back there, they should stop.

Q. Stop on passing track in order to make an investigation?

(Note the leading of Petitioner's own witness.)

A. Yes, sir.

Q. How is the traffic, the train traffic handled on the road there between Glenwood Springs and Grand Junction?

A. C.T.C., centralized traffic control.

Q. All right, tell the jury what centralized traffic control is?

A. Centralized traffic control, it is man—one man operates the whole, the switches and turn-outs, he lets you in the passing track and lets you out the passing track with your train. You don't have to throw the switches, it is automatic. He has got a board up there and he can follow the train by little spots on this board, and he can let you in and out the passing track himself. You don't have to get off the engine, turn the switch.

Q. And, Mr. Ventura, when a train comes up against the signal there at the west switch point at Chacra, and it is clear, why then, of course, you can move right on, pass the switch point and continue on the main line?

A. Yes, sir.

The only scintilla of evidence that investigations were made is the leading question by counsel of his own witness: "Q. Stop on passing track in order to make an investigation? A. Yes, sir."

Linkins at R. 68, 69 testified as follows:

Q. Mr. Linkins, during the years that you have been employed as an engineer and fireman by the Rio Grande, you may state, in a general way, the usage made of this passing track at Chacra?

A. Well, all it's for is just when they got one train going east and west, they have to get them by one another, why, they put one on the passing track, and the other holds the main line and they pass.

Q. What about occasions where something happens to the train, makes stopping necessary?

A. Well, since they installed this C.T.C., when we get something like that, and have to stop, it is customary to try to stop between the switches, so as not to tie the railroad up, and if there is any other trains going in either direction, they can come, in case you are in trouble, then not going to be able to move.

Q. When you are in trouble and the train moves in to Chacra, what does the train crew usually do?

A. Well, they—after the train, you mean after they have stopped or before they have stopped?

Q. Yes, after they have stopped?

A. Well, they get off and try to ascertain what the trouble is.

Q. When you say "they," you refer to the rear end crew?

A. Well, the rear end crew and the head brakeman, he gets off and starts back, and the conductor, he comes forward until he meets the head man, and, of course, the hind man, he has got to go back and flag; that is his duties.

Q. In other words, the rear end brakeman goes back to flag, the conductor comes forward to ascertain what the trouble is?

A. Yes.

Q. The head end brakeman goes back towards the scene of the trouble?

A. Yes.

The pictures at R. 206-208, 217 show the nature of the country at Chacra. It is open, mountainous and unsettled country. There is nothing but a passing track and a bridge. The record does not justify and is contrary to plaintiff's exaggerated statements regarding the use of these tracks.

(9 *There is no evidence of any custom or practice for disabled trains to go to Chacra or that the train in question proceeded any distance to Chacra or that any one except the engineer decided to stop at Chacra.*

On pages 4 and 5 petitioner states that there is such a custom and practice and at page 5 petitioner states that he made the decision to go on to Chacra and that the train went four or five miles to get to Chacra. At page 8 petitioner states that the evidence demonstrated that the crippled train was moved several miles. This is gross exaggeration. The only thing petitioner did was to show a red signal, which meant to stop (R. 76). *At the time when this signal came to the attention of the engineer he was at the east switch of the Chacra siding* (R. 76). He pulled the train far enough to clear the east switch and stopped about 700 feet short of the west switch. (R. 70.) Far from there being any custom and practice for a disabled train to proceed to a particular siding, it is, of course, always a matter for the exercise of judgment as to whether the trouble is such that it must be repaired at the

earliest possible moment or whether the train can safely proceed to a siding. Of course, if the train can safely proceed to a siding, that is the preferable course because it does not tie up the single track main line. Merely because this particular train was stopped for repairs on this occasion does not establish a custom or practice to stop at Chacra for repairs and there is no other evidence to that effect.

(10) *There is no evidence that the conductor and trainman were required in the exercise of their duties to walk along the south side of a train over the bridge.*

On pages 9 and 10 petitioner's brief states that the work of inspection and repair necessarily requires the conductor and brakeman to dismount and proceed over the bridge along the south side of trains standing over the bridge. There is no such evidence. On the contrary the evidence shows that when a train was standing over the bridge it was impossible for a person to walk along the south side of the train over the bridge. (R. 24, Exhibit E, R. 207, admitted in evidence R. 28.) How could a reasonable trainman think that it was necessary or proper to scramble along a stringer and ties on the south side of the bridge when he knew that there was a safe platform on the north side.

(11) *There is no evidence that any of respondents' bridges, situated as was the bridge at Chacra, was provided with walks and railings.*

On page 7 it is asserted that all bridges on Respondents' railroad on the same division as Chacra, except the one at Chacra involved in this accident, within switch limits were equipped with foot walks and hand rails. On page 35 it is asserted that the railroad itself established the standard for construction and maintenance of bridges located as was the bridge at Chacra and that they departed from this standard of care by failing to equip the Chacra bridge with a walk and railing and it is further asserted that the evidence was uncontradicted that all bridges within such limits, except Chacra, were equipped with footwalks and hand rails.

This contention was made before the Supreme Court of Utah, which reviewed the evidence, and summed it up in its opinion as follows:

> In the case at bar it appears that bridges on the line between Grand Junction and Mintern which are within 300 or 400 feet from switches have walkways for trainmen who leave the train to throw switches. (R. 180.)

There is no evidence that there was any custom or practice, either on the Denver and Rio Grande Railroad or any other railroad, that there should be a footwalk or handrail at a place such as the bridge at Chacra. Nor is there any evidence that where there is a footwalk between the main line and passing track, as at Chacra, there should also be footwalks and handrails outside of the tracks.

Only Pauly and Linkins testified on these subjects. Pauly described ten bridges (R. 140-142), which were equipped with footwalks and handrails. The bridge at Rifle he described as having a footwalk and handrail on only one side. (R. 141.) On cross-examination he admitted that he had not counted any bridges other than those with foot-walks and hand-rails. (R. 145.) He didn't deny that there were 67 bridges altogether between Minturn and Grand Junction (R. 145), a fact which was assumed to be true by counsel for all parties. (R. 145, 151.) He testified only as to 10 out of 67 bridges on the part of the railroad on which he worked. As to the ten with foot-walks and hand-rails, he testified that they were at or within 300 or 400 feet of switch points of passing tracks (R. 145); and that the purpose therefor at those points is to provide a thoroughfare for head brakemen who have to run ahead to throw switches. (R. 145-146.)

There is an obvious difference between the bridge at Chacra and those described by Pauly. Where there is a bridge within 300 or 400 feet of a switch there must be a foot-walk for the head brakeman to run along to throw the switch. Otherwise he would have to climb over the engine. That is what Pauly said in his evidence at R. 145, 146. The bridge at Chacra was not in such a position. It was 2000 feet from

the east switch and 4600 feet from the west switch. (R. 114, 115.) But even if it had been within 300 or 400 feet of a switch, the head brakeman could have crossed over the foot-walk between the tracks.

Linkins' evidence was merely that the majority of the sixty-seven bridges between Grand Junction and Minturn and Bond were between stations but not between or right at switches. (R. 151.)

All of the evidence on the subject of what bridges on the division in question are equipped with walks and rails is as follows:

Pauly's direct examination on this subject follows in full: (R. 140-142.)

> Q. Now, Mr. Pauly, I want to ask you to state whether or not you are familiar with and acquainted with bridges over creeks or canyons in the various yards of the defendant, and between various switch points in the divisions on which you were employed?
>
> A. I am.
>
> Q. And have you, during the 17 years that you worked for the railroad company examined and noticed those bridges?
>
> A. Yes, sir.
>
> Q. You may state whether or not the bridges that you have mentioned—that is, bridges across creeks or gullies between switch points and other switch and passing tracks are equipped with a foot walk and hand rail?
>
> A. They are.
>
> Q. And are they painted?
>
> A. They are painted white.
>
> Q. Do you have a list there in your pocket of similar—of bridges that are over creeks and gullies between switch points?
>
> A. Yes, sir.
>
> Q. All right, let's tell the jury about it.
>
> (Witness takes a paper out of his pocket.)

A. That is going east out of Grand Junction at Cameo, there is a bridge there entering switch points, has—

Q. Is that bridge between the switch points or—

A. Right at the—entering switch points, "switch points" as we call them.

THE COURT: How do you spell that?

A. C-a-m-e-o.

Q. Describe the bridge and the walk and the hand-rail.

A. Well, it's the length of it, you mean?

Q. Well, just go ahead and describe it.

A. Bridge about the length of the jury box, and, oh, I imagine it was about ten, fifteen feet deep, has hand rails and a foot walk on both sides of the bridge. Tunnel has a small bridge in the middle of it, extends through the passing track and the main line, and it has a hand-rail and foot-walk. Egan has a bridge at east end on the—leaving the switch points; that is a rather long bridge, not very high; it has a foot-walk and guard rail. And Beck has a very high bridge. It's in the middle of the—well, you know how the tracks extend. It is betwen the main line, it runs underneath both tracks, way I should state it, it has guard rails and hand-rails on both sides and it is painted white. Grand Valley has a small bridge, not very deep, and has a hand-rail, foot path, and it is also painted white. Of course, Chacra—let's see, Rifle has a bridge and it extends through both passing track and middle track on main line, and it has a hand rail and foot walk on the left-hand side, not on the right, just on the one side, on the main line side. Chacra—

Q. There is no bridge there.

A. No bridge.

Q. Or no foot walk?

A. No foot walk on either side or hand-railing. Funston is a big high bridge; it has a foot walk, it isn't

painted yet, and it has a guard rail on the east end of it and a foot walk across, all the way.

Q. And Funston is six miles to the—

A. East.

Q. East of Chacra?

A. And Dotsero has a bridge going towards the cut-off, and it was on the Y there, main line, as they call it, cut-off; it has foot walks on either side—guard rails, and footwalks, and it is also painted white. Going towards Minturn, there is one high bridge there—there are two high bridges there, one on the east switch point and one on the west switch point, both are equipped with hand-rails and foot-walks, both are painted white.

Q. You have now completed your statement in response to my question?

A. Yes, sir.

Pauly's cross examination on this point follows in full (R. 145, 146):

Q. Have you ever counted the number of bridges between Grand Junction and Minturn?

A. No, can't say that I ever counted them.

Q. Would you say there is about 67 of them?

A. I don't know about the number.

Q. And that there are only 16 of those 67 that have walks and hand-rails?

A. Well, I don't know; I haven't gone over them in my mind.

Q. You just counted those that you found with walks and hand-rails?

A. Yes, sir.

Q. That one in Cameo was within 400 feet of switch points, wasn't it?

A. It is right on the entering switch—switch points, yes.

Q. It is within 400 feet of switch points, is it not?

A. Oh, yes.

Q. And several others of these hand-rails and foot-walks that you mentioned were within three or four hundred feet of switch points, were they not?

A. Well, right on the switch points, there wasn't —I wouldn't say three or four hundred feet.

Q. Well, they were within that, I mean.

A. Yes.

THE COURT: Either on or within four hundred feet.

Q. Yes, that is what I mean.

A. All right.

Q. Now, it frequently happens, does it not, in operating trains that a train will come to a stop and the head brakeman has to make a run to a switch to throw a switch?

A. Yes, sir.

Q. Now, those bridges and hand-rails that are either at the switch or within three or four hundred feet are placed there for the purpose of giving a thoroughfare to that head brakeman, isn't that right?

A. Just a moment, right now, just put—

THE COURT: Do you want to have that question re-read to you- You said, "Just a minute," like you didn't understand or something.

A. At these particular places, yes, that's correct.

The evidence of Linkins on this subject follows in full (R. 151):

Q. Mr. Linkins, there was suggested yesterday, in one of the questions Mr. Van Cott addressed to Mr. Pauly, to the effect that on this division that you are working on—that is, division between Grand Junction and Bond and Grand Junction and Minturn, there is sixty-seven bridges over tracks and gullies, and the like, that pass under the track; you may state whether or

not these sixty-seven bridges are in switch limits, or are the majority of them on the main line track beyond switch limits?

A. Well, I'd—I never counted the bridges, or—but I would say that the majority of them is between switches that—between the different stations, the majority of them bridges; of course, there is bridges in a good many places that's between the switches and right at the switches, and—

(12) *The jury returned a general verdict but made no special findings.*

Petitioner's brief would create the impression that the jury made special findings and arguments are made based upon such an assumption. Thus, on page 10, petitioner states that the jury found that he was injured because of the unsafe condition of the bridge. Again on page 10 he states that the jury found causal relationship between the failure to equip the bridge for foreseeable use. On page 14 he states that the jury selected and acted upon the reasonable inference that the passing tracks and adjacent territory at Chacra were used for the inspection and repair of trains and to that extent was a work place. On page 31 petitioner states that the jury found that the whole of the territory at Chacra was a place of work. On page 32 he states that the jury found that the railroad could reasonably foresee that trainmen intent upon the discharge of duty would alight from the south side of trains standing upon the bridge. On page 36 he states that the jury found that the bridge was a place of work. On page 38 he states that the jury found that the railroad should reasonably have foreseen the likelihood of injury to employees because of the condition of the bridge.

The only justification for these statements is a general verdict (R. 19) which necessarily implies only that the jury found that the railroad was guilty of some negligence and that Pauly was guilty of some contributory negligence. The general verdict does not justify the contentions made by petitioner that the jury made any particular findings of fact.

## SUMMARY OF ARGUMENT

### I

**The Supreme Court of Utah Properly Set Aside the Jury's Verdict and Dismissed the Petitioner's Case because the Verdict of the Jury was not supported by Substantial Evidence.**

According to the recent decisions of this court under the Federal Employers Liability Act there must be evidence of negligence on the part of defendants and such negligence must be a proximate cause of the accident. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should direct a verdict in favor of the defendant. In the application of this rule it is not sufficient that there be merely a scintilla of evidence. There must be substantial evidence. The mere possibility that an accident may result from a given condition is not sufficient to constitute negligence. An accident and injury are always possible. Merely because an accident occurs and an injury is suffered is no evidence of negligence. Inasmuch as there was no substantial evidence of negligence on the part of the railroad which proximately contributed as a cause of this accident, the Supreme Court of Utah properly decided that the trial court should have directed a verdict for the defendants.

### II

**The Supreme Court of Utah properly held that there was no Evidence of Negligence by the Railroad in failing to exercise reasonable care in furnishing Petitioner with a safe place of work.**

The only allegation of negligence in this case is that the defendants failed to furnish plaintiff a safe place of work in that it did not maintain a walkway with handrails on the south side of the bridge at Chacra and that it also failed to provide lights or markers to indicate the presence or dimen-

sions of said bridge. There is no evidence that the absence of lights and markers on the bridge constituted negligence. Also there is no evidence that the absence of footwalk and handrail on the bridge constituted negligence.

Under the uncontradicted evidence the place where Pauly stepped down on the south side of the bridge at Chacra cannot be regarded as a place of work as to Pauly under the facts and circumstances involved. The emergency work which he had to do was some 500 to 750 feet west of the bridge. There was a perfectly safe way for Pauly to get to the place where the sticking brake had to be fixed by descending on the platform on the north side of his train. Pauly knew that there was a platform on the north side and none on the south side. He had thought about this only a few seconds before the train came to a stop and guessed that the caboose had passed over the bridge. Acting upon that guess, with adequate means to see, he stepped down from the caboose without looking.

If a railroad must take means to prevent a trainman from falling, as Pauly did, it would have to provide something in the nature of life nets along its entire road because trains at times may stop any place on a railroad because of trouble. Chacra was nothing but a siding to which trains might proceed in case of trouble, if not too far away and if the trouble permitted.

Cases involving falls from bridges decided by the Supreme Court of the United States, Circuit Courts of Appeal and State Courts demonstrate that this case should not have been submitted to the jury. Petitioner has failed to distinguish these cases.

None of the cases cited by petitioner supports his contention that the railroad was guilty of negligence in failing to equip the south side of the bridge, as well as the north side, with a walk and railing. As a matter of fact, there is no evidence that Pauly would not have been injured in dismounting as he did even if there had been a walk and railing. So far as is made to appear, such a railing might have tripped him and caused him to fall headlong instead of feet first, in which case he might have been more seriously injured or killed. A walk

and rail are designed to walk upon, not as a life net to catch experienced conductors.

## III

**The Supreme Court of Utah correctly held that there was no reason why the Railroad, in the exercise of reasonable care, should have anticipated that an experienced conductor would step off a caboose without looking and provide facilities to catch him.**

As matter of law the railroad should not have been required, in the exercise of reasonable care, to anticipate that an experienced conductor, such as Pauly, with full knowledge of the existence of a safe platform on one side of the train and with full knowledge that he was in the immediate vicinity of the bridge, would step therefrom without looking, in violation of rules and regulations, although equipped with adequate means to see precisely where he was.

## IV

**The Supreme Court of Utah correctly held that a verdict should have been directed because the sole cause of the accident was Pauly's own negligence.**

The Supreme Court of Utah held that Pauly's own negligence was the sole cause of the accident because it was the only negligence involved, whether proximate or remote. This was correct because there was no evidence that the defendants were negligent in failing to have a walk and railing on the south side of the bridge and also because a jury should not be permitted to find that the railroad, in the exercise of reasonable care, should have anticipated that Pauly would act as he did.

The decision of the Supreme Court can also be supported because Pauly's negligence was the sole proximate cause and

made remote the negligence of the railroad, if any. Without question, if Pauly had actually known that he was stepping into space, his voluntary act would be the sole proximate cause. The situation was the substantial equivalent of actual knowledge because Pauly knew of the fact that there was a safe place on the north side and that there was no place to dismount on the south side. He had thought about it only a few seconds before, guessed that he had passed the bridge and acted upon that guess by stepping down without looking. Accordingly under the doctrine announced by this court in a recent case, no negligence on the part of the railroad was a link in an unbroken chain of reasonably foreseeable events.

## ARGUMENT

### I

**The Supreme Court of Utah Properly Set Aside the Jury's Verdict and Dismissed the Petitioner's Case because the Verdict of the Jury was not supported by Substantial Evidence.**

Herein of Petitioner's Point I.

*Under the F. E. L. A. there must be evidence of negligence on the part of the defendants and such negligence must be a proximate cause of the accident.*

*Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232. Decided Dec. 20, 1943. This case arose under the F. E. L. A. The decedent was killed by a car, on which he was riding, running over a derail switch. There was a failure of evidence as to what person set the derail which caused the accident, whether Brady or some other person. The court held that verdict was properly directed for the defendant. On pages 479 and 480 the court said:

> * * * *When the evidence is such that without weighing the credibliity of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit,*

*directed verdict* or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. *By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.*

On page 480:

• • • Our conclusion is that there is failure to show in the record any negligence of the carrier from not putting a light on the derailer or by the action of other employees than decedent in closing the derailer.

On page 483:

• • • *The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause.*

On page 484:

• • • *Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury.*

*Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409. Jan. 17, 1944. On page 32 the court said:

*In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident.* Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 63 S. Ct. 444, 451, 143 A. L. R. 967. *Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."*

*Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 86 L. Ed. 446, 63 S. Ct. 444. On page 67 the court said:

> They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the accident.

The recent case of *Lavender* v. *Kurn*, decided by this court and quoted from on page 13 of Petitioner's brief does not change this rule. On the contrary, on page 744 the court says: "Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." That is precisely the situation in the case at bar, where Pauly by his own affirmative evidence shows that there is a complete absence of probative facts to support the verdict.

*DeZon* v. *American President Lines, Ltd.*, 318 U. S. 660, 87 L. Ed. 1065, 63 S. Ct. 814. This was an action brought under the Jones Act, 46 U. S. C. A., Sec. 688, granting the same cause of action to seamen as those granted to railroad employees by the Federal Employers Liability Act.

*Under the F. E. L. A. there must be more than a scintilla of evidence. Unless there is more than a scintilla of evidence the case may not be submitted to the jury.*

*Brady* v. *Southern Ry. Co., supra.* Dec. 20, 1943. On page 479 the court said:

> * * * *The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury.*

*The mere possibility that an accident may result from a given condition is not sufficient to constitute negligence.*

*Brady* v. *Southern Ry. Co., Supra.*

This Court held that although it was a bare possibility that striking a derailer from an unexpected direction would

cause an accident that it was so unusual that provision to guard against it was beyond the requirements of due care. On page 483 the court said:

> The Supreme Court of North Carolina (222 N. C. at page 370, 23 S. E. 2d at page 338) was of the view that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. *With this we agree. Bare possibility is not sufficient.*

An accident and injury are always possible. Merely because an accident occurs and an injury is suffered is no evidence of negligence.

Accordingly, inasmuch as there was no substantial evidence on the part of the Railroad which proximately contributed as a cause of the accident, and the sole proximate cause of the accident was the negligence of Pauly, the Court properly decided that a verdict should have been directed.

## II

**The Supreme Court of Utah properly held that there was no Evidence of Negligence by the Railroad in failing to exercise reasonable care in furnishing Petitioner with a safe place of work.**

Herein of Petitioner's Point II.

The only allegation by petitioner that defendants failed to exercise due care to furnish him a safe place to work is in subparagraph B of paragraph 9. (R. 4.) It charges that the Railroad failed "to build, construct and maintain a walk with handrails on the side of the bridge" and failed to provide any lights or markers to indicate the presence or dimensions of said bridge and failed by any means to protect employees against the dangers of the bridge. (R. 4.) Subparagraph A of paragraph 9 of the complaint, which is referred to by the Supreme Court of Utah at R. 172, was in fact stricken from

the complaint by the District Court on motion of Respondents and does not appear in the printed record, (R. 4) nor in the original record (Fol. 4).

*There is no evidence that the absence of foot walk and hand rail on the south side of the bridge constituted negligence.*

There is no evidence that there was any custom or practice, either on the Denver and Rio Grande Railroad or any other railroad, that there should be a footwalk or handrail at a place such as the bridge at Chacra. Nor is there any evidence that, where there is a footwalk between the main line and passing track, as at Chacra, there should also be footwalks and handrails outside of the tracks.

Only Pauly and Linkins testified on the subject. Pauly's entire evidence on the subject is to be found at R. 140-142 on direct and at R. 145, 146 on cross-examination and is set forth in full in Section 11 of this brief under the heading "Omissions and Misstatements of Facts in Petitioner's Statements of Facts."

Pauly was asked on direct examination only as to bridges at sidings between switch points. (R. 140-142.) He described ten such bridges (R. 140-142), which were equipped with footwalks and handrails. The bridge at Rifle he described as having a footwalk and handrail on only one side. (R. 141.)

On cross-examination he admitted that he had not counted any bridges other than those with footwalks and handrails. (R. 145.) He didn't deny that there were 67 bridges altogether between Minturn and Grand Junction (R. 145), a fact which was assumed to be true by counsel for all parties. (R. 145, 151.) He testified only as to 10 out of 67 bridges on the part of the railroad on which he worked. As to the ten with footwalks and handrails, he testified that they were at or within 300 or 400 feet of switch points of passing tracks (R. 145); and that the purpose therefor at those points is to provide a thoroughfare for head brakemen who have to run ahead to throw switches. (R. 145, 146.)

Linkins' evidence was merely that the majority of the sixty-seven bridges between Grand Junction and Minturn and Bond were between stations but not between or right at switches. (R. 151.)

There is an obvious difference between the bridge at Chacra and those described by Pauly. Where there is a bridge within 300 or 400 feet of a switch, there must be a footwalk for the head brakeman to run along to throw the switch. Otherwise he would have to climb over the engine. That is what Pauly said in his evidence at R. 145, 146. The bridge at Chacra was not in such a position. It was 2000 feet from the east switch and 4600 feet from the west switch. (R. 23, 24.) Such was the conclusion of the Utah Supreme Court as to the evidence and facts. (R. 180.) But even if it had been within 300 or 400 feet of a switch, the head brakeman could cross over the footwalk between the tracks.

*Under the uncontradicted evidence the place on the south side of the bridge at Chacra where Pauly stepped off cannot be regarded as a place where he had work to do.*

Petitioner adopts as the major premise of his argument that every foot of ground at the Chacra siding, both between the tracks and on the sides, are places of work which must be kept safe as to all employees, at all times and under all circumstances and claims this is supported by the doctrine of the Supreme Court of the United States in the case of *Bailey v. Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062. The difference between the two cases is obvious. Bailey's job was to release the dumping mechanism so that the material would fall from the car to the road below. In order to do that he could only take one position, to wit: at the side of the car and on the edge of the bridge. It was obviously a place of work selected for him by his superiors. Pauly on the other hand, had nothing to do on the bridge except to cross it and to proceed westerly ten to fifteen car lengths (500 to 750 feet), there to eliminate sticking brakes. Moreover, there was a perfectly safe way for Pauly to get to that place. He could dismount on the north side of his caboose on the platform.

Inasmuch as under the uncontradicted evidence there was no reason for Pauly to get down from the caboose on the south side and there was a safe platform on the north side, he was reduced to the necessity of claiming that every place in Chacra, including the place from which he fell, was such that there must be some provision made, so that he would be caught when he dismounted without looking. Petitioner makes that contention on pages 17 and 18 and claims that the evidence of Ventura, Linkins and Pauly supports it. He contends that all three of them testified that "this territory was a place of work." No reference to the record for such extraordinary evidence is given. None such was given. It would have been objectionable as a conclusion of law.

All of Ventura's evidence on this subject will be found at R. 43, 44; Linkins' at R. 68, 69; and Pauly's at R. 88, 89 and is set forth in this brief in section 8 under the heading "Omissions and Misstatements of Fact in Petitioner's Statements of Facts."

That evidence was carefully considered and analyzed by the Supreme Court of Utah at R. 174, 175, 177 and it is submitted that it is correctly summarized at R. 177 and 178 as follows:

> The engineer, Linkins, did not so testify. The inference from all the other testimony as to the use of the passing tracks was that they were for the purpose of passing and that, if there was trouble with the train, it endeavored to reach the nearest passing tracks in order not to block traffic; that this was incidental and a convenience and that they were not used generally for inspection and if used to inspect in case of trouble that such place was no more a place to work in the matter of inspection or repairs than was any other similar part of the railroad line.

To be sure, the south side of the bridge at Chacra might have become a place where work was to be done under certain circumstances. Suppose for example a car had to be dumped, as in the Bailey case, and the employee was directed by his superiors to stand on the south side of the bridge to manipulate

the dumping mechanism, he would have work to do at that place. Or suppose the fire on the trouble car was caused by a *hot box* on the south side (as Justice Turner erroneously assumed in the case at bar, R. 195) and that car stopped on the bridge and Pauly was directed by his superiors to fix the hot box while standing on the south side of the bridge, it would be a place where he had work to do.

But merely because a certain spot on a railroad is a place where work has to be done under certain facts and circumstances, it does not follow that work has to be done there under all facts and circumstances. Thus in the *Bailey* case, suppose there was no car on the bridge and the decedent, instead of standing on the edge of the bridge to manipulate the dumping mechanism was merely walking from one end of that bridge to the other to get to the place where he was to perform emergency work and, instead of using a perfectly safe platform walk between the rails was walking along that same stringer and fell therefrom. Obviously that stringer would not be a place where he had work to do under those circumstances.

It is uncontradicted that Pauly's only purpose was to proceed to the car with the sticking brakes and cut out the air brakes on that car. This could have become necessary any place on the railroad. It did not pertain particularly to a passing track. This train went as far as the side track at Chacra only because it was near at hand and because it could safely do so. (R. 70.) Otherwise it would have been stopped on the main line between stations. Pauly had no work to do on the bridge. (R. 88.) He would use the bridge only to cross the creek to the car with sticking brakes. To do this he had a perfectly safe walk way between the main line and passing tracks.

If the railroad was required to regard the south side of this bridge as a place of work which it must keep safe so that conductors could step off cabooses without looking, it would follow that every foot of ground, not only in the Chacra siding but over the entire railroad, would have to be kept in like condition. A brake may stick any place on the railroad. If it sticks and is sufficiently dangerous, the train must be

stopped out on the main line where there is no siding at all. It might be stopped on trestles, mountain sides, etc. (R. 133.) It merely happened that this sticking brake was seen at a time when the engine was right at the Chacra siding and under such circumstances that the engineer concluded they could safely go on to that siding. Pauly had to proceed from the place where the caboose stopped to the place where the brakes were sticking. For this purpose the Railroad had a duty to furnish a reasonably safe way to cross the creek. But that duty the Railroad fulfilled by building a safe platform between the main line and passing track.

A train can and does get into trouble away from sidings as well as at sidings. In fact it would usually be away from sidings. Of course, if a train is stopped by trouble out on the line, away from sidings trainmen must move along the train and look where they are going to prevent falling. Pauly admitted on cross-examination that there are many, many places on a railroad where trainmen must look before alighting. At R. 133 he testified:

> Q. Now, there are many, many places on a railroad where if you didn't look for a safe footing before you alighted from equipment, you would be seriously injured, aren't there?
>
> A. Yes.
>
> Q. For example, between stations, there are many places between Dotsero and Chacra in Glenwood Canyon, for example, where if you didn't look you would go clear down the side of the canyon, isn't that true?
>
> A. Yes, sir.
>
> Q. Haven't you made a practice of—through your railroad experience, to look before you stepped down from equipment?
>
> A. Yes, sir.

Obviously the place where Pauly stepped off was not intended as a place of work because there was nothing to stand or walk on. Between the tracks there was a wooden platform. That was the place to walk. There was no more reason to

have a footwalk on the south side of the Chacra bridge for Pauly to alight on than on any bridge on the main line. Petitioner has not had the temerity to contend that railroads must provide rails and walks at all places on their lines.

***Cases involving falls from bridges decided by this and other Courts demonstrate that this case should not have been submitted to the jury.***

A case from this Court is *Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510. Decided 1932. Berry was an experienced rear brakeman injured when he attempted to alight in the night time from a caboose standing on a bridge which had no foot walk or guard rail and was so narrow as to afford no foothold, with all of which he was familiar. Berry and his conducor rode in the caboose. The caboose stood on the trestle. The conductor ordered plaintiff to go ahead and fix the hot box. Plaintiff took his lantern, walked down the caboose steps, stepped into space and fell in the ravine spanned by the trestle. This court declared that the sole cause of the accident was the negligence of plaintiff and that there was no evidence of negligence by the railroad. Mr. Justice Stone delivered the opinion. On pages 275 and 276 the court said:

> There was no breach of duty on the part of the conductor in asking the respondent, in the performance of his duty, to alight or in failing to inspect the place where he alighted or to warn him of the danger. *If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act.*

The Berry case was relied on in *Kenney* v. *Boston & Maine R. R.*, 33 Atl. (2d) 577, 92 N. H. 495. Kenney was killed while serving as head brakeman of a freight train, when he stepped from the side ladder of a box car which had been stopped on a bridge within station limits at Merrimack, N. H. There was no walk or guard rail. The train was proceeding south on the main line on a dark night. The crew had orders

to leave two cars and pick up one at Merrimack. Accordingly the train stopped just north of a block signal about 1400 feet north of the Merrimack station. 465 feet south of the block signal was a switch leading to a siding known as the McElwain Siding. 240 feet south of this switch was the north end of the bridge. 631 feet south of the bridge was the station and 535 feet south of the station was a switch leading to a siding called the Excelsior Siding. After the train stopped the crew proceeded with the work of cutting out the two cars to be left at Merrimack. This work was done under the direction of the deceased, it being his duty to throw the switches and attend to the coupling and uncoupling of the cars. He first uncoupled the head car and upon his signal the engine took it south sufficient to clear the switch and it was left on the side track. The engine went back and cut off another car which was drawn south over the bridge past the station and set upon the side track. The engine then picked up the car on the side track which was to be picked up and coupled to the cars that had been left standing north of the block signal. In taking this car back to the cars north of the block signal the engineer stopped the locomotive with the car on which the deceased was riding from eight to ten feet north of the south abutment of the bridge. The engineer testified that the deceased gave the signal to stop. After the stop the engineer saw the deceased with his lighted lantern climb down the side of the car and fall into the creek below.

The plaintiff contended that the Railroad was negligent in not providing the bridge, as a work place, with a cat walk and a rail. The trial court submitted this ground of negligence to the jury and the Supreme Court of New Hampshire held as matter of law that there was no duty on the part of the railroad to anticipate that Kenney would use the bridge as a work place. The court said on page 560:

> Considering the circumstance of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge. As far as appears, he had

> occasion to alight on the main track only at the switches and station. The test of the duty of the defendant to make the bridge safe as a work-place being anticipation (cf. D'Ambrosio v. Boston & M. R. R., 81 N. H. 119, 124 A. 551) no duty in that respect can be found. *The bridge was not a workplace in the sense that might perhaps have been found if the shifting operations were likely* to result in a car standing on the bridge.

Commenting on the *Berry* case as compared with the *Kenney* case, the court said:

> On the facts, omitting speculation as we must, this appears to be even a weaker case than Baltimore & O. R. Co. v. Berry, 286 U. S. 272, 52 S. Ct. 510, 511, 76 L. Ed. 1098, where the conductor gave the brakeman orders to get off for a railroad purpose and the brakeman stepped into space.

Another case that followed the Berry case is *Yazoo & M. V. R. Co.* v. *Sudduth*, 171 Miss. 619, 157 So. 527 (1934). The decedent, Sudduth, was head brakeman. The main line track ran north and south through Harriston and the bridge was located about twenty car lengths south of the station. Two railroad lines crossed in Harriston and there was a good deal of switching and interchange of cars. On the east side of the bridge there was a walkway from one end to the other. On the west side there was no walkway and no way to alight from the west side of the train while it was standing on the bridge. Shortly after starting southerly from the station within Harriston the rear trainman discovered that the air in the brake system had been cut. The engineer was signalled to stop and did so. Sudduth was then in the cab of the engine and heard the engineer remark, "they have flagged me down." It was dark. The deceased thereupon took his lighted lantern, walked by the fireman toward the west side of the cab. He was not seen thereafter until he was found in the creek bed below the bridge. The court held that the Railroad Company was entitled to a directed verdict. Referring to the case of *Baltimore & Ohio R. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510, the court on page 529 said:

We are unable to distinguish any difference i principle between the present case and that case. In th present case both the engineer and Sudduth knew o the danger, while in that case neither the conducto nor the brakeman knew of the danger. In neither cas was there any fact or circumstance to put the superio employee on notice that his subordinate might be in jured in alighting from the train and therefore shoul be warned against the danger.

Another case following the Berry case is *Missouri Pacifi R. Co.* v. *Hathcock*, 200 Ark. 294, 139 S. W. (2d) 35, 1940 Hathcock, a brakeman, was injured when he fell from a trestle The train proceeding northerly stopped in the city of Newport Ark., about one hundred feet north of a trestle. The conducto directed plaintiff to get off the caboose where he was riding and back flag. It was dark and stormy. Plaintiff got out and in attempting to pass over the trestle fell into the creek bed below. The trestle had no lights or guard rails. He testified that he did not know where the trestle was and that he had been over it only a couple of times. The court held that the defendant was entitled to a directed verdict. It said on page 39

* * *

* * * Appellee's explanation is that he thought he was on a dump, and dumps are built so that one step ping off the railroad will not fall into space. But this assumption was appellee's error of judgment. *Ordin ary prudence suggests that one engaged at night or unfamiliar premises should use the means at hand for observing his course when departing from a zone of safety.*

* * *

Railroad companies are not as a matter of law re quired to maintain banisters on trestles. The fact that in some instances this extraordinary care is exercised does not establish by implication a custom upon which employees may rely to the extent that they are re lieved of the obligation due themselves to observe phys

ical conditions where the means of so doing are provided.

Another case following the Berry case is *Marinko* v. *Chicago, M., St. P. & P. Ry. Co.*, 63 S. D. 256, 257 N. W. 639 (1934). Marinko, a bridge carpenter, was riding in a bunk car to a point on the defendant railroad where he had been directed to repair a bridge. About three miles west of Selfridge the train stalled and it was decided to cut the train in half and take it to Selfridge in sections. After the train was cut in two and the first section moved, the bunk car in which the plaintiff was riding stood on a bridge. Plaintiff decided to get out and descended the ladder on the outside of the car and stepped into space. It was dark and stormy and there was no walkway or rail along the bridge. Marinko claimed that the defendant was nelgigent in failing to provide a reasonably safe place to work. The Supreme Court of South Dakota held that the trial court erred in refusing to grant a directed verdict.

In *Davis* v. *Shirer*, 288 Fed. 293, (4th C. C. A. 1923), the plaintiff was a flagman and was injured when he fell from a trestle. The space between the ties was covered with ballast exactly as it would have been if the trestle had been a solid embankment, except at the outer edge on each side there was placed a sill in the shape of a timber 10x14, the purpose of which was to hold the ballast in place. The ballast was about three feet in width outside the ties on each side of the rails. The ballast sloped downward toward the sill. Plaintiff's intestate was attempting to get on his train, which was moving over this trestle, and fell into the creek bottom below. There were no guard rails along the ends of the trestle. Plaintiff contended that the defendant was negligent in not providing guard rails on the ends of this trestle. The court held that there was no duty to make the trestle safe for its employees to get on or off the trains. In the opinion on page 296 it is said:

> No standard of reasonable care requires a railroad so to construct its trestles that they can under all conditions be safely used by pedestrians when a train is standing on them or moving over them.

*Petitioner wholly fails to distinguish the Berry, Kenney, Sudduth, Hathcock, Marinko and Shirer cases.*

On pages 25 and 26 petitioner argues that prior to 1939 there could be no recovery for negligence by an employer in failing to furnish an employee with a safe place of work. Such a statement is entirely inconsistent with the history of the law of Master and Servant. That basis of liability existed many years before the Federal Employers Liability Act came into existence. To be sure, assumption of risk was a defense to it in Federal Employers Liability Act cases prior to 1939. But petitioner's argument that prior to that amendment, "a case founded entirely upon negligence in failing to furnish a safe place of work could not have been successfully presented by an injured employee," is just plain silly. It assumes that the defense of assumption of risk would always be established as matter of law. Thousands of cases refute the argument.

On page 25 petitioner says that prior to 1939 actions to recover for injuries, "such as exemplified in the case at bar were usually founded upon a charge of negligence of employees and not upon a failure to furnish a reasonably safe place of work." This also is silly and without historical justification. As matter of fact, in the *Berry* case itself the case was submitted to the jury on the allegation that the Railroad "permitted plaintiff to alight from said caboose * * * although they knew * * * of the aforesaid condition" (i. e. the unguarded trestle).

Petitioner seeks to distinguish the *Berry* case by asserting that it was decided before the 1939 amendment of the F .E. L. A., which eliminated the defense of assumption of risk. That amendment in no way affects the *Berry* case. There is no discussion in the Berry case of assumption of risk. The case is decided on the ground that there was *no evidence of negligence on the part of the railroad* sufficient to be submitted to the jury. The Court in the *Berry* case had before it a case where the trestle involved had no walk *on either side.* It was a more dangerous situation than Pauly's. The Supreme Court in the Berry case stated that there was no evidence that Berry *could not have discovered* the danger by use of his lantern.

The evidence is stronger in the case at bar because it affirmatively shows that Pauly could have discovered the danger by the use of his lantern if he had used it or looked.

Petitioner in his brief repeatedly asserts that Pauly's failure to look for a safe footing bears only on the question of contributory negligence and not on the question of the defendants' negligence. But the Supreme Court in the *Berry* case shows the contrary by commenting upon the absence of evidence that Berry could not have discovered the danger by using his lantern and reaching the conclusion that if negligence caused the injury it was exclusively that of the respondent. The Supreme Court held that the Missouri court erred in permitting the case to go to a jury in spite of the fact that there was no evidence of negligence on the part of the railroad.

Petitioner argues that every vestige of the defense of assumption of risk was wiped out by the 1939 amendment and cites cases to that effect. No citation of authority is necessary. Respondents cannot and do not make any contention to the contrary.

On page 26 Petitioner attempts to avoid the authority of *Kenney* v. *Boston and Maine R. Co.* by asserting that the bridge involved was not a work place and claims that if it had been shown in the *Kenney* case that trains were customarily stopped upon the bridge that the holding would have been otherwise. The New Hampshire court would say the same of Pauly's case. There was more reason in the Kenney case than in Pauly's case to say that the bridge was a place of work. The bridge involved in the *Kenney* case was very near to the railroad station in Merrimac. The railroad was double tracked; there was a siding known as the McElwain Siding; another siding called the Excelsior Siding and there was a railroad station building. Merrimac was a place where industry was carried on. There was a factory called the Excelsior factory. Chacra, of course, had no industry, no siding, nothing but a passing track.

Petitioner seeks to distinguish his case from the *Kenney* case by saying that he was in the course of his duties when he alighted from the caboose. But Kenney was on duty and it is not to be presumed that he descended out of whim or caprice.

As is pointed out in the Bly case, Kenney was entitled to the presumption that he was acting with due care.

Petitioner seems to concede the applicability of the *Sudduth, Hathcock, Marinko* and *Shirer* cases by making no effort to distinguish them.

*No authority supports petitioner's contention.*

He relies primarily on *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062. The difference between the two cases is pointed out above.

A recent case which distinguishes the *Bailey* case on facts much like those in the case at bar is *Kenney* v. *Boston & Maine R. R.*, 33 Atl. (2d) 557 92 N. H. 495.

The facts are fully stated supra. The plaintiff contended that the Railroad was negligent in not providing the bridge, as a work place, with a cat walk and a rail. The Supreme Court of New Hampshire held as matter of law that there was no duty on the part of the railroad to anticipate that Kenney would use the bridge as a work place. The court said on page 560:

> Considering the circumstances of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge.

In addition to the *Bailey* case, Petitioner relies on *Cawman* v. *Pennsylvania-Reading Seashore Lines*, 110 Fed. (2d) 832, (3rd C. C. A.), *Bly* v. *Southern Railway*, 183 Va. 162, 31 S. E. (2d) 564, rehearing denied, 183 Va. 406, 32 S. E. (2d) 659; *Bimberg* v. *Northern Pacific Railway Company*, 217 Minn. 187, 14 N. W. (2d) 410, (certiorari denied, 323 U. S. 752, 89 L. Ed. 602, 65 S. Ct. 87; *Rashaw* v. *Central Vermont Railway, Inc.*, 133 F. (2d) 253 (2 C. C. A. 1943); *Murphy* v. *Boston and Maine Railroad*, Mass. 65 N. E. (2d) 923.

*Cawman* v. *P.-R. S. Lines*, 110 Fed. (2d) 832 (3rd C. C. A.) 1940 is not helpful because the facts involved are not dis-

closed. It is impossible to tell whether the trestle was on the main line or on a siding or in a station. For aught that appears it may have been in a place where there was a clear duty to anticipate danger to an employee in a place of work. The Supreme Court of New Hampshire in the *Kenney* case supra so declares on page 560:

> The plaintiff relies upon Cawman v. Pennsylvania-Reading Seashore Lines, 3 Cir., 110 F. 2d 832. The facts are so meagerly stated in that case that it is impossible to know how it fits into the grouping of authorities. We can do no more than assume that it is consistent with the rule above stated. *As it stands, it proves no more than that under some circumstances a bridge may be found to be a workplace for a freight brakeman, and as such it ought to be railed.*

The Supreme Court of Utah took the same view of the Cawman case (R. 181).

The *Cawman* case asserts on page 834 that the *Berry* case involved only failure of *personnel*, not failure of *material*. But so did the *Berry* case. It involved an injured plaintiff who might not have been injured if there had been a walk and rail. This necessarily involves "failure of material,"—but not the breach of any legal duty with respect to material because the court on page 512 expressly negatives the existence of any negligence:

> * * * If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was pre-requisite to recovery under the Federal Employers' Liability Act. (45 USCA Secs. 51-59.)

The *Bly* case is readily distinguishable because it is within the doctrine of the Bailey case. Bly had to dismount from the caboose for the purpose of back flagging; the caboose steps extended out beyond the edge of the trestle on both sides; Bly, encumbered with his signaling impedimenta, had to swing around the end of the caboose platform from the steps in order to get on to the bridge. He fell down under the steps of the caboose where it had stopped and was killed. The court in-

dulged the presumption of due care applicable in death cases and not applicable in such cases as Pauly's, where Pauly took the witness stand and testified that he did not use any care whatever. He could have descended between the tracks on a perfectly safe bridge.

The *Bimberg* case is within the doctrine of the *Bailey* case. The decedent under direction from his superior was working on the bridge, using a lining bar to straighten the railroad track. He could not be elsewhere.

In the *Rashaw* case it was necessary for the deceased brakeman to cross the bridge as he did cross and the bridge was not in standard condition, that is, it was under repair and was covered with ice.

In *Murphy* v. *Boston and Maine R. Co.*, the court assumed that decedent fell from a sea wall along which he necessarily had to pass to reach his engine, unprotected by a guard rail. Upon that assumption it is like the *Rashaw*, *Bly* and *Bimberg* cases as distinguished from the *Kenney* and *Berry* cases and the case at bar.

*There is no evidence that the absence of lights and markers on the bridge constituted negligence.*

The allegation regarding lack of lights and markers comes to nothing because there is no evidence that the Denver and Rio Grande Western or any other railroad in the United States has ever maintained lights or markers in such position.

Ventura and Linkins testified on direct examination that there were no lights on the bridge. On cross-examination Ventura testified that there never are any lights on bridges or along passing tracks; that it is always left to trainmen to see conditions by their lanterns; and that railroads furnish electric lanterns, batteries and light globes for their use. (R. 44.) Linkins also on cross-examination testified that railroads never have lights on bridges to illuminate the bridges. (R. 73.) There is no evidence to the contrary of that of Ventura and Linkins. But it must be remembered that in this case Pauly didn't look. What good would lights on a bridge do for a man who doesn't

look? Pauly had a lighted electric lantern and a burning yellow fusee with him. Either was sufficient to illuminate the bridge and disclose the conditions. He used neither. Petitioner has laid no stress on this point.

## III

**The Supreme Court of Utah correctly held that there was no reason why the Railroad, in the exercise of reasonable care, should have anticipated that an experienced Conductor would step off a Caboose without looking and provide facilities to catch him.**

Herein of Petitioner's Point III.

The Utah Supreme Court reaches this conclusion at R. 189, 190. Petitioner expresses consternation at such a holding. It is elementary in the laws of torts. This court recently reiterated the doctrine.

*Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232.

The court held that it was not reasonably to have been anticipated that the condition of the derailer and worn rail would cause the accident. On page 483 the court said:

> * * * *Bare possibility is not sufficient.* Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469, at page 475, 24 L. Ed. 256; "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury *it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Events too remote to require reasonable provision need not be anticipated.*

On page 484 the court said:

> * * * Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard

> against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. Decedent had first closed and then opened the derailer on the first movement. He signalled the train to back into the storage track just before the fatal accident. Although this misuse of the derailer was an act of negligence, it is mere speculation as to whether that negligence is chargeable to the decendent or another. Without this unexpected occurrence, the adequacy of the rail vis-a-vis a properly used derailer is unquestioned. It was entirely disconnected from the earlier act of the carrier in placing the weak rail in the track. *The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.*

It is well settled law, as stated in the Brady case, that in determining whether a defendant is guilty of negligence, it is necessary that he anticipate only such possibilities as may be reasonably expected.

*Kenney* v. *Boston & Maine R. R. Co.*, 33 Atl. (2d) 557, 92 N. H. 495, applied this well settled principle of law. On page 560 the court said:

> Considering the circumstance of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge. As far as appears, he had occasion to alight on the main track only at the switches and station. The test of the duty of the defendant to make the bridge safe as a work-place being anticipation (cf. D'Ambrosio v. Boston & M. R. R., 81 N. H. 119, 124 A. 551) no duty in that respect can be found. The bridge was not a workplace in the sense that might perhaps have been found if the shifting operations were likely to result in a car standing on the bridge.

*A. T. & S. F. Ry. Co.* v. *Calhoun*, 213 U. S. 1, 53 L. Ed. 671, 29 S. Ct. 321. On page 9 the court said:

> * * * It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. *It has been well said that "if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible human affairs could not be carried on at all.* The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." Pollock on Torts, 8th ed. 41.

And on page 10:

> * * * There was a wooden platform by the track at the station 100 feet more or less in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity, much less that a person would take a helpless infant and while thus running attempt to place it on the train. *We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence.* For these reasons the judgment must be reversed.

It has been repeatedly so held by courts of highest authority.

*Fort Smith Gas Co.* v. *Cloud*, 75 Fed. (2d) 413 (8th C. C. A.);

*Kansas City So. Ry. Co.* v. *Pinson*, 23 Fed. (2d) 247 (5th C. C. A.);

*Virginia Ry. Co.* v. *Station*, 84 Fed. (2d) 133 (4th C. C. A.);

*C. St. P. M. & O. Ry. Co.* v. *Elliott*, 55 Fed. 949 (8th C. C. A.);

*St. Mary's Hospital* v. *Scanlon*, 71 Fed. (2d) 739 (8th C. C. A.);

*Davis* v. *Schroeder*, 291 Fed. 47 (8th C. C. A.);

*Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159, 53 L. Ed. 543, 29 S. Ct. 270;

*Richmond and Danville R. Co.* v. *Elliott*, 149 U. S. 266, 37 L. Ed. 728, 13 S. Ct. 837.

This Court said in the *Brady* case on page 484:

> *The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.*

It would not be reasonable to require that the railroad should anticipate and guard against such extraordinary conduct and events as are here involved. Pauly knew that he was in the immediate vicinity of this very bridge. (R. 108.) He knew that it had a safe platform between the tracks on the north side. (R. 106, 107.) He knew that there was no walk or handrail on the south side of the caboose. (R. 106, 107.) He thought about the danger of the bridge a very short time before he stepped off, (R. 108) and then stepped off without looking (R. 133-135) although he had adequate means to see. (R. 52, 62, 91, 157.)

He was working under a rule which required him to look for a safe footing before he descended. (R. 7, 132.) He knew about this rule (R. 132), and that he was supposed to obey

it (R. 130). If he had obeyed this rule the injury would not have occurred.

He could easily have seen the danger if he had looked. He had a burning yellow fusee (R. 91) and a lighted electric lantern in his hand. (R. 91.) Either one furnished ample light for him to have seen, if he had looked, that he was stepping off into space. (R. 52, 62, 157.) By the light of his yellow fusee Pauly could have seen clearly 25 to 30 feet. (R. 56.) Ventura testified that a yellow fusee gives a little darker light than the light in the court room (R. 62) which was a 300 watt light. (R. 157.) The fusee and lantern are in evidence.

There was no reason why he should not have descended onto the platform between the tracks. There was seven or eight feet clearance between the tracks even if both were occupied by trains. (R. 50.) There was no train on the passing track.

Pauly alleged in his complaint that he could not safely step down on the north side of the train because Train No. 20, a passenger train, was then passing and that it would have been unsafe to descend between a standing train and a moving train. (R. 3.) At the taking of the deposition Pauly testified that Train No. 20 passed him in its entirety while he was still on the rear or east platform of the caboose, that while there standing he checked the train and all of the equipment in it, and that only after it had passed him did he reenter the caboose, put on his coat, light his lantern, walk to the front or west end of the caboose, light his fusee and then step down on the left or south side of the caboose into space without looking. (R. 163, 164, 168.) At the trial Pauly attempted to change his evidence on direct examination by saying that he was on the front end when Train No. 20 passed him. (R. 89.) On cross-examination, however, Pauly again admitted, and his final testimony was, that he was on the rear platform when Train No. 20 passed him. (R. 123, 126, 127, 128.) Such was also the evidence of Ventura who testified that when he dropped off the caboose the engine of No. 20 was about at the caboose. (R. 53.) When he dropped off, his train was going three to four miles per hour. (R. 51.) Train No. 20

consisted only of an engine, mail car, baggage car, day coach and sleeper. (R. 54.) When Pauly got off, his train had come to a stop.

There was no train other than Train No. 20 on the passing track. (R. 128, 164.) Ventura met no other train when he walked up to meet the head brakeman and then walked back (R. 49), although he walked some 1200 feet in each direction. (R. 46.) It would necessarily follow that when Pauly stepped off the front end of the caboose, there was no train on the passing track.

But even if there had been a train on the passing track as well as on the main line track there would still be 7 or 8 feet clearance between the trains (R. 50), which would have been ample. (R. 49.) Pauly could have discovered the sticking brakes just as well on the north side as the south side. He attempted to justify his act of descending on the left or south side of the caboose because when he saw the fire flying from the car 15 or 20 car lengths ahead the fire was seen on the left or south side. He could see the fire on that side because the train was then on a curve to the left. This made it possible to see the train ahead of the caboose on the left or south side and impossible to see the side of the train ahead of the caboose on the north or right hand side. (R. 85-87.) It is uncontradicted in the record that when one brake on a certain truck of a freight car is sticking, that all four of them are sticking. (R. 49, 148-150.) This is necessarily so because they are controlled by the same levers and brake cylinder. (R. 49, 148-150.) Thus the truck on which the brakes are sticking and throwing fire can be detected from either side of the train. Thus Pauly and Ventura had just as much reason to expect to find the sticking brakes on the north side as the south side of the train. (R. 49.) Moreover, it is demonstrated in this case that the sticking brakes could have been found on the north or right hand side after the train stopped because Ventura, when he went west after the accident, walked between the main line track and the passing track over the safe foot walk and found the sticking brakes from that side. (R. 46, 58, 59, 60.) He detected it by smoke from the wheels. (R. 60.)

Pauly also attempted to justify his getting down on the south or left side by saying that if he got off on the right or north side he would have had to cross over the draw bars when he came to the car with sticking brakes. This was not pleaded (R. 3) and was merely an afterthought. Pauly testified unequivocally in his deposition taken August 1, 1944, that he stepped down without looking. (R. 167.) At the trial on September 25, 1944, he attempted on direct examination to testify that he did look (R. 92, 95), but on cross-examination once more admitted, and his final testimony was, that he did not look. (R. 133, 134, 135.) Pauly testified that when his deposition was taken he was in full possession of his faculties, suffering no pain and not confused. (R. 103, 104.)

Even though he testified on direct examination that he looked down before he dropped off, yet by his own admission he did not look effectively because he didn't use his burning fusee or his lighted lantern to examine what he was dropping on. He made the ridiculous excuse that the fusee and lantern are not for that purpose. (R. 139, 140), although later he admitted they were for that purpose. (R. 144.) Ventura, who descended only a few seconds before Pauly, used his lantern and saw from its light alone that he was dropping on to a safe footing. (R. 53.)

*In spite of all this Pauly stepped off the front of the caboose on the south side and without looking.* This could not be reasonably anticipated. This was not a chain of reasonably foreseeable events.

Petitioner argues that the railroad should reasonably have anticipated that employes would descend from the train on the south side and that the injury would result because there were no lights, walkways or guard rails. That contention disregards the all important facts that Pauly, an experienced conductor in charge of the train, thoroughly familiar with the rule requiring him to look for a safe footing, knowing that he was in the immediate vicinity of the bridge and might be on it, and with a lantern and fusee which would have enabled him to see, nevertheless stepped down without looking. Plaintiff's argument would require a railroad to take

precautions against trainmen stepping off trains without looking at any place on the railroad.

Petitioner's contention comes to this, that the railroad should anticipate that an experienced conductor, with seventeen years experience as a railroad trainman, knowing of the rule that he must look for a safe place to alight before stepping off trains, would in violation of that rule, and with ample facilities to see, knowing that he was near and might be on the bridge, step off the train without looking, and that the railroad should have either a walk with a rail to catch him or hang life nets over the edge of the right of way if nothing else would be feasible.

Petitioner argues that the south side was the safe and proper side from which to alight. His own evidence proves that that was not his judgment. He thought about the bridge and thought he had passed it. (R. 108, 109.) After the accident he exclaimed that he thought he was past the "darned bridge." (R. 51.) Except for his mistake or inadvertence, the inference is clear that he wouldn't have stepped down on the south side but would have stepped down on the platform to the north.

Pauly's complaint recognizes that he would not have dismounted on the south side but would have used the safe passage way over the creek on the north side of his train except that he alleged that train No. 20 was passing. His only allegation explaining why he chose to step off on the south side is that Train No. 20 was passing and therefore it was dangerous to get off on the north side. (R. 3, 4.) As the record demonstrates Train No. 20 had passed. When he dismounted that danger did not exist.

Throughout his brief petitioner argues that if the bridge at Chacra had had guard rails or a walkway or lights on the south side the petitioner would not have been injured. This is the typical "hind sight" argument which runs all through petitioner's brief—the defendant was negligent because the place of work must have been dangerous because petitioner fell and if the place had not been dangerous petitioner would not have fallen. It reasons in a circle and begs the question. Moreover, it is pure speculation to assert that Pauly would not

**have been injured if there had been a walk and rail. It would depend on how wide the walk might be, the position of the rail, and how he stepped and landed. It is within the realm of reasonable possibility that he might have received just as bad injuries as in fact he did. A walkway and rail are designed to walk on, not to catch experienced conductors who fall without looking.**

## IV

**The Supreme Court of Utah correctly held that a verdict should have been directed because the sole cause of the accident was Pauly's own negligence.**

Herein of Petitioner's Point IV.

Petitioner on page 45 complains that the Supreme Court of Utah held as matter of law that Pauly's negligence was the sole *proximate* cause of the accident. The Utah court states at R. 189 that the Railroad made such a contention, but reasons that, if the railroad was negligent in failing to equip the south side of the bridge with a walk and railing, such negligence would be concurring negligence and that therefore, "we are referred back to the fundamental question under consideration, viz., whether the (railroad) owed any duty to plaintiff under the circumstances of this case." At R. 189-190 the court said:

> If the appellant had a duty to construct a platform on the bridge on the south side of the main line in order to intercept the drop of the respondent or, put in another way, to make it safe for him to get off regardless of his care or lack of care, then failure to do so was negligence which negligence, since it failed to preserve the respondent safe from his own lack of care, was a concurring cause of the accident and his negligence was not the sole cause. If, on the other hand, the appellant did not owe such duty, it was not negligent in not so constructing the platform and there being no negligence which concurred in or contributed to the respondent's negligence, his negligence was the *sole proximate cause.*

It will be observed that although the court used the expression, "sole *proximate* cause," its reasoning demonstrates that it was dealing only with the question of whether the Railroad was guilty of any negligence and concluded that it was not guilty of any negligence and therefore the sole negligent cause was that of the petitioner. The reasoning of the Utah court is not that the railroad and petitioner were both negligent and that the petitioner's negligence was proximate and the railroad's remote and that therefore the sole proximate cause of the accident was the petitioner's negligence. Its reasoning is that the railroad was not guilty of any negligence and therefore the petitioner's negligence was the sole cause of the accident.

*Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510, supports this conclusion. On page 512 the court said:

> * * * If negligence caused the injury it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act (45 U. S. C. A. Secs. 51-59).

The judgment of the Supreme Court of Utah can also be supported upon the ground that Pauly's negligence made any negligence by the railroad remote.

If negligence of respondents was not a proximate cause and if the sole proximate cause of the accident was petitioner's own negligence, there can be no recovery under the F. E. L. A.

This Court in the *Brady* case said on page 484:

> The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

Under the test laid down by the *Brady* case the question is whether the alleged negligence of the railroad in not having a footwalk and handrail on the south side of the bridge, in addition to the platform on the north side, is a link in an unbroken chain of reasonably foreseeable events. If the chain of events was not reasonably foreseeable by the railroad, its

failure to have a footwalk and handrail is not the proximate cause of the accident. Is it reasonably foreseeable that Pauly would behave as he did. If not, then the undoubted negligence of Pauly in violating rules of the company and stepping off the caboose without looking was the sole proximate cause of the accident.

Is it reasonable to require the railroad to foresee that Pauly would violate its rule? Is it not reasonable for the railroad to anticipate that Pauly would comply with its rule? If Pauly had complied with the rule this accident would not have occurred. If he had looked out for a safe footing before stepping down from the caboose, as required by Safety Rule 3, he would not have been injured.

*Kenney* v. *Boston & Maine R. R.*, 33 Atl. (2d) 557, 92 N. H. 495. The facts are stated under II. On Page 561 the court said:

> * * * *If he had known where he was and had stepped off as he did, his negligence would have been the sole proximate cause of his injuries and death.*

No one would contend the contrary. But Pauly knew where he was. He knew that he was in the near vicinity of this bridge. He thought about the bridge and the danger of it when he was in the caboose just before he went to the front platform and stepped off. To be sure, he thought he was three or four car lengths past the bridge. Of course, he could not be certain of that and knew that he could not be certain of it. Nevertheless he stepped off the caboose without looking. It is submitted that Pauly's negligence was the equivalent in legal effect of stepping of the caboose in spite of the fact that he knew where he was, and that his behavior is within the well established doctrine stated by the *Kenney* case.

For those reasons Pauly's violation of the safety rule was the sole proximate cause of the accident.

## CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Utah directing the dismissal of the action correctly reflects the law as announced by this court with respect to the Federal Employers' Liability Act.

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